In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 242.

JAMES F. SEXTON,

Petitioner,

vs.

ELEANORE M. BARRY,

J. FRANK POLLOCK,

Judge, Probate Court of Lake County,

THE STATE OF OHIO,

THE COURT OF PROBATE, LAKE COUNTY,

CARL V. WEYGANDT,

Chief Justice, Supreme Court of Ohio,

THE STATE OF OHIO,

THE SUPREME COURT OF THE STATE OF OHIO,

Respondents.

REPLY BRIEF OF PETITIONER.

I.

Respondent Barry charges that counsel for the respondent Barry at no time admitted that respondent Judge Pollock resigned because he was "biased and prejudiced in fact." The truth is that such an admission was made, as will be readily apparent by the quotations which follow.

Respondent Barry in her brief (p. 6, Brief in Opposition) quotes from the respondent Judge Pollock's journal entry of resignation. Her quotation is incomplete. That part which constitutes the omission reads as follows:

> "Now, therefore, on his own motion the Court enters a finding that **he is disqualified** to continue as Judge in the above entitled case and also in a related case entitled In re Estate of Patrick Sexton, Deceased,

> involving all of the same parties and issues growing out of the same estate, and he requests the Chief Justice of the Supreme Court of Ohio to assign another Judge to the case as provided by Section 2101.39 R. C." (Emphasis added.)

This journal entry incidentally is entered in Doc. 7, p. 147, entitled "In re Trusteeship of Patrick Sexton, Deceased."

Respondent Barry in the State and Federal Courts has been represented by a total of five attorneys, two being from Painesville and three from Cleveland, Ohio. Her Painesville attorneys were and are Miss Irene A. Lennon and Mr. William M. Hubbard, and in a brief filed by them in the District Court (in respect to which see p. 36a of the Appendix Record) there appears the following:

> "Plaintiff then filed in the Probate Court an affidavit of prejudice against J. Frank Pollock, Probate Judge. After correspondence (which is attached to the complaint filed herein) with the Chief Justice of the Supreme Court of Ohio, Judge Pollock **disqualified** himself on **the ground of prejudice** * * *" (Emphasis added.)

As one reads the journal entry of respondent Judge Pollock and the above admission, one can come only to the conclusion that the prejudice was conceded in fact by the respondent Barry's counsel. Any statement otherwise is a misrepresentation to this Court.

In connection with the prejudice charge, which has now been adjudicated actually adversely to the respondent Probate Judge, the petitioner emphasizes again that the importance of the prejudice is in laying the foundation for the charge of conspiracy against Judge Pollock and those with whom he combined. In connection therewith, the petitioner likewise again emphasizes the "usual practice" under Ohio law, in respect to which see again *State ex rel. Pratt v. Weygandt, Chief Justice*, 164 Ohio St. 463, 132

N. E. 2d 191 (1956). As pointed out in the petition, a Judge in Ohio doesn't just resign unless of course he is prejudiced. See Cleveland Press, August 4, 1956, in reference to *Miller v. Miller*, Common Pleas Court, Cuyahoga County, Ohio, wherein the Judge contested the prejudice and demanded a hearing. A photostatic copy of the article to which reference is had is attached hereto (p. 9) of this reply brief), and note the seriousness with which Justice Weygandt speaks as to the "unbenching" of a Judge. Then consider the respondent Judge Pollock's entire conduct as outlined in the correspondence in the appendix record, and then consider further the charge of conspiracy, all of which charges are admitted for purposes of a motion to dismiss.

II.

Respondent Barry's argument that the action is moot was advanced to the court below. *Porter v. Lee*, 328 U. S. 246 (1946) presents the rule clearly in a manner contrary to the respondent's contentions, and this is because service of process was had both upon the Ohio Supreme Court and upon Justice Weygandt. Also see *In re Murchison*, 349 U. S. 133, at page 136. The respondent Barry does not answer the violation by the court below of this Court's decision, both as to *Porter v. Lee, supra*, and *In re Murchison, supra*. Furthermore, respondent Barry does not answer as to the charge of conspiracy or the fraud with respect to the short-form record filed by her in view of the denial of a fiduciary to the estate. In this respect, reference again is made to *Simon v. Southern Railway*, 236 U. S. 115 (1915) and *Wells Fargo & Co. v. Taylor*, 254 U. S. 175 (1920) (See Petition for Certiorari, pp. 17 and 25) and in *Chessman v. Teets*, 350 U. S. 3 (1955) (See Petition for Certiorari, pp. 20 and 21).

III.

The complaint in this case charges conspiracy on the part of a State Judge. The acts of prejudice are detailed in the complaint so as to lay the foundation for the overt acts evidencing that conspiracy. In the court below the respondent Barry never even thought to question the adequacy of the complaint in this respect. In fact, petitioner might add, respondent Barry recognized quite clearly the conspiracy aspect of the case.[1] Under such circumstances, the petitioner has been denied his forum, not because of the probate statutes of Ohio, but because the courts of a State were part of a conspiracy to deprive the petitioner of the remedy which those statutes explicitly accord to him, and that is the distinction over those cases which respondent Barry cites in her brief. The court below is clearly and squarely in conflict with *Picking v. Pennsylvania Railroad*, 151 F. 2d 240 (C. A. 3, 1945), cert. denied 332 U. S. 776 (1947), because it is the conspiracy which lays the foundation for District Court jurisdiction in a situation wherein the judgment in the State Courts has become an absolute nullity because of the conspiracy. In this connection, even in her brief, by her reference to the language of Justice Holmes, the respond-

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[1] On page 12 of the brief filed by respondent Barry in the court below, the respondent Barry herself viewed the complaint as presenting the following question:

> "Should the District Court below have assumed jurisdiction in a civil action to control proceedings in an action filed in the Probate Court of Lake County, Ohio and then on appeal in the Supreme Court of Ohio, on the ground that the Probate Judge of Lake County, Ohio and the Chief Justice of the Supreme Court of Ohio, in the course of their official acts in that proceeding, were parties with appellee Barry to a fraudulent conspiracy to deprive appellant of his rights under the Fourteenth Amendment to the Constitution of the United States?" *Brief of Appellee Barry, Sixth Circuit*, page 12.

ent Barry does this petitioner and his cause an honor because Justice Holmes sees his law as the petitioner sees it. The New York Times, August 21, 1927, on page 19, quotes Justice Holmes. In his statement as there quoted, Justice Holmes makes a distinction as to what the *Sacco and Vanzetti* case did not involve, and he did this so as to distinguish that case from a proceeding which would be absolutely void, while in the instant cause it is the petitioner's contention that the respondent Judge Pollock's conduct in these proceedings was such as to make the entire proceedings void in the Ohio courts. See *Chessman v. Teets*, 350 U. S. 3 (1955), and compare as to the alternative jurisdictional grounds in the 754 page Bill of Exceptions herein which, as is pointed out in the complaint (9a-10a), could have been automatically waived as a record to be considered by the Ohio Supreme Court, this through appointment of a fiduciary who then could have been joined to the suit, and then consider the respondent Judge Pollock's denial of a fiduciary to the estate in view of the Ohio statute providing for the appointment as a matter of right. The language of Justice Holmes compares almost exactly to the allegations of the complaint filed by the petitioner in the District Court, and it may be noted that his language as quoted in the footnote below[2] compares exactly to the fourth and fifth questions of the

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[2] Justice Holmes in distinguishing what the *Sacco and Vanzetti* case did not involve states:

> "It is asked how it would be if the Judge were subsequently shown to have been corruptly interested or insane. I will not attempt to decide at what point a judgment might be held to be absolutely void on these grounds * * *." New York Times, August 21, 1927.

Then compare the entire statement of Justice Holmes with the questions presented by petitioner. Also compare with *Chessman v. Teets*, 350 U. S. 3 (1955).

petitioner (See Petition for Certiorari, pp. 2 and 3) and presents additional reason for allowance of certiorari.

Relative to *Sutton v. English*, 246 U. S. 199 (1918), the respondent Barry has now contrived a new argument. Because that case interpreted local law in a probate case so as to deny District Court jurisdiction in a diversity of citizenship case, the respondent Barry now argues that the due process clause of the Fourteenth Amendment has absolutely no application to a probate case and thereby endeavors to justify the decision of the court below. The effect is to carry an argument to the sublime in the logical process, because it is to say that for a Probate Court to deny life, liberty and property to a litigant is a permissible practice and the Fourteenth Amendment does not comprehend such exception. The very argument presents additional reason for allowance of certiorari.

IV.

The respondent Barry endeavors to argue against certiorari on the basis of 163 Ohio St. 124. The answer to that contention is *Chessman v. Teets*, 350 U. S. 3 (1955), wherein this Court has held that an interference with the appellate processes denies due process of law under circumstances such as constitute fraud. Such interference was present in this case, and it was fraudulent and corrupt in motive. As is pointed out in the Petition for Certiorari (See pp. 8 and 9 thereof), there were two alternative grounds of decision in the 754 page Bill of Exceptions. The two alternative grounds related to the 1930 and 1937 frauds in the estate (See Petition for Certiorari, p. 14). These alternative grounds were not considered by the Ohio Supreme Court as a record before it. A fiduciary in the estate could have waived the printing of a record in the

Ohio Supreme Court so that the 754 page Bill of Exceptions, and the evidence of the 1930 and 1937 jurisdictional facts, would have become the record to be considered by that court. Nevertheless, the fiduciary was denied to the estate as the result of the respondent Judge Pollock's participation in the conspiracy charged in the complaint.[*] The very charge of fraud raises in the District Court a federal question, and inasmuch as that fraud involves a State Judge and his place in a federal system, the importance of this case is such that it should receive almost an automatic acceptance on certiorari.

V.

In conclusion, the petitioner makes a passing comment on the respondent Barry's quotation of that part of the journal entry of resignation which is contained in her brief. The very use by her of a part of a journal entry, and the part that was used, quite apparently evidences the respondent Judge Pollock's motive and purpose in filing it. To answer the part of the journal entry which she quotes is merely to raise the question as to why the respondent Judge Pollock had to resign. As among the reasons, the following can briefly set forth: (1) a six day hearing and a 754 page Bill of Exceptions; (2) a letter by respondent

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[*] Even as to that part of 163 Ohio St. 124 which the Ohio Supreme Court decided there is considerable question. Compare *In re Estate of Miller*, 160 Ohio St. 529, and then consider that the remedy of *Johnson v. Johnson*, 51 Ohio St. 446, 38 N. E. 61 (1894), was transferred to the probate courts by amendment of the probate statutes in 1932.

In this connection, it is to be noted that the respondent Barry has never denied the existence of the application for continuance which was forwarded, registered mail, return receipt, to the Ohio Supreme Court for filing and which was never filed. Not only does this constitute interference with appellate processes, but also it is an indication that due process is not to be had in Ohio whatever the remedy.

Barry's counsel quoting the respondent Judge Pollock as to the existence of an estate; (3) his efforts to "kill" and to "bury" a 754 page Bill of Exceptions; (4) his antedating of findings of fact; (5) his statement to the effect that "he didn't intend to get caught"; (6) personal discourtesies to litigants; (7) failure to appoint a fiduciary in the estate pending appeal; (8) violation of a Mandate through his refusal to appoint a fiduciary; (9) failure to take action to protect the disputed assets pending outcome of the litigation in the Ohio Supreme Court (1a-34a). The last time in the respondent Judge Pollock's court, when the petitioner filed his application asking for a revision of the journal entry of resignation (19a-21a), the respondent Judge Pollock stated that there would never be a hearing in his Probate Court on it (51a, Appendix Record).[1] This petitioner now wants in a District Court of the United States a hearing on the face of a complaint which, as the Petition for Certiorari points out, the District Court has held states a cause of action on the due process aspect of the case. This interpretation of the District Court's decision is not denied by the respondent Barry, and that is why the respondent Judge Pollock does not want a hearing on the prejudice and conspiracy.

Respectfully submitted,

JAMES F. SEXTON,

Attorney for Petitioner.

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[1] That remark incidentally has a very special significance in view of the subsequent Supreme Court decision and the charge of collusion against the respondent Justice Weygandt.

APPENDIX D.

Excerpt from Cleveland Press, August 4, 1956.

Court Refuses to Shift Miller Marital Tangle

The quadrangle marital affair mother today received a stinging courtroom rebuke from Chief Justice Carl V. Weygandt of the Ohio Supreme Court.

Weygandt dismissed the claim of Mrs. Marjorie Miller, 36, that Chief Justice Samuel H. Silbert of the Cuyahoga County Common Pleas Court was "biased and prejudiced" against her because he termed her "brazen and bold."

Mrs. Miller got the original verbal slap for leaving her husband, Jerome Miller, 40; her four daughters, and her home at 21314 Kenwood Ave., Rocky River, to take up residence with Russell Dimond, 39, at 2765 Walters Rd., Westlake.

Mrs. Elizabeth Dimond, who remained in the Westlake home, had sued Mrs. Miller for $75,000 for alienation of affections.

Dimond accompanied Mrs. Miller to Lakeside Courthouse this morning. The pair ignored Miller, who was also present, and Mrs. Charlotte Smith, Mrs. Miller's foster mother, who is now caring for her daughters.



JEROME MILLER attended prejudice hearing held in connection with divorce action. His wife, Marjorie, was rebuked.

Addresses Mrs. Miller

Weygandt, after hearing two hours of testimony, addressed Mrs. Miller.

"I'm going to speak directly to you," he said.

"You have challenged the fairness and impartiality of a judge. I suppose you feel that the judge used strong language when he said you were 'brazen and bold.'

"But when the judge found that you—the mother of four children — have left these youngsters and consorted with a married man, and admit constant misconduct—should the judge ignore these facts?

"The primary consideration shown by Judge Silbert for the care of your children was proper.

Commends Silbert

"It is my duty as chief justice to commend him for what he did.

"I am finding no difficulty in deciding that he should not be unbenched."

Judge Silbert was called to the witness stand by Weygandt when attorneys for the Millers failed to summon him.

He said he could preside impartially at trial of Miller's suit for divorce, set for next Wednesday, although he had told Mrs. Miller she would "get no consideration from this court unless you remain in your home and be a good wife and mother."

"Gave Offense"

"I said she could not carry on openly and notoriously, because her conduct gave offense to public decency and morals," Silbert testified.

"I felt that, as a married woman, she had to do something to enrich the marriage. If she leaves her home and children and lives in the same house with another man, she is not entitled to have the court grant her support."

Miller, a trailer court operator, is suing for divorce. Mrs. Miller is asking a property settlement and custody of the children.

Mrs. Miller left the courthouse with Dimond after the legal rebuff.